Artcraft Displays, Inc.;[1] Freeman Decorating Company; C.D. Displays, Inc., d/b/a Freeman Design & Display Company;[1] Transamerica Convention Service, Inc.; United Display, Inc. *and* Independent Decorators & Exhibit Employees Alliance Local No. 1, Petitioner. Case 23-RC-5049

July 23, 1982

DECISION AND DIRECTION OF ELECTIONS

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Robert G. Levy II on January 7, 8, 11, and 12, 1982. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 23 transferred this case to the Board for decision. Thereafter, Freeman Decorating Company and C.D. Displays, Inc., d/b/a Freeman Design & Display Company, the Petitioner, and Sign and Pictorial Painters, Local Union No. 550, affiliated with the International Brotherhood of Painters and Allied Trades, an Intervenor,[2] filed briefs with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error.[3] They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employers are engaged in various aspects of the convention and decorating business in Houston, Texas. Artcraft Displays, Inc., and Freeman Design & Display Company essentially fabricate convention exhibits and displays. Freeman Decorating Company supplies labor, furniture, tables, carpeting, drapery, and other materials for trade shows and conventions. Transamerica Convention Service, Inc., and United Display, Inc., are also engaged in the business of convention decorating.

During the 12-month period preceding the hearing, Artcraft Displays, Inc., performed services valued in excess of $50,000 or customers located outside the State of Texas. During the same period, C.D. Displays, Inc., d/b/a Freeman Design & Display Company and Freeman Decorating Company each purchased goods valued in excess of $50,000 from firms located outside the State of Texas. During its past fiscal year, Transamerica Convention Service, Inc., received revenues in excess of $50,000 directly from customers located outside the State of Texas. During its past fiscal year, United Display received revenues in excess of $50,000 directly from customers located outside the State of Texas. We find, therefore, that the Employers are engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The parties present at the hearing stipulated, and we find, that the Sign Painters is a labor organization as defined in the Act.

The record shows that the Petitioner is an organization in which employees participate and which exists for the purpose of representing employees in collective bargaining. We find, therefore, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The Sign Painters and Freeman Decorating and Freeman Design maintain that the Petitioner should be disqualified from representing the employees in the petitioned-for unit on the basis that there is a conflict of interest between the Petitioner and the employees it seeks to represent. This argument is based upon their contention that the Petitioner is under the influence of leadmen who are supervisors as defined by Section 2(11) of the Act. They rely primarily upon the Board's decision in *Sierra Vista Hospital, Inc.*[4] There we recognized the potential conflict of interest between employees and a union in which supervisors participate, and we found that an employer may lawfully refuse to bargain with such a union if it establishes that the danger of a conflict of interest is clear and present.[5]

The employees in the petitioned-for unit decorate convention and meeting halls for conventions, trade shows, and the like, and also construct various types of exhibits that are used in connection with those functions. For the sake of convenience, those employees will sometimes be collectively referred to as "decorators." Each Employer has a

[1] The names of these Employers appear as amended at the hearing.

[2] Carpenters District Council of Houston & Vicinity is also an Intervenor in this proceeding.

[3] Prior to the hearing, the Sign and Pictorial Painters filed a motion to dismiss the petition on the basis that the Petitioner does not have a sufficient showing of interest, that the Petitioner is not a labor organization, and that there is a contract bar. The Sign Painters has not adduced any evidence, or even put forth any argument, to support its allegation that the Petitioner lacks a sufficient showing of interest. Accordingly, we deny that aspect of the Sign Painters motion. The other aspects of the motion are identical to issues addressed herein and are likewise denied for reasons subsequently stated.

[4] 241 NLRB 631 (1979).

[5] *Id.* at 633.

complement of regular, full-time decorators. The decorating business in Houston is seasonal, with the consequence that each Employer, except for United Display, hires part-time decorators as they are needed. To obtain those employees, the Employers contact the Sign Painters, which maintains a referral list. The Sign Painters refers decorators to the Employers on the basis of seniority. The Employers, however, choose part-time leadmen. The part-time decorators work with full-time decorators, do the same work, receive the same wages, and are directed by the same leadmen who direct the full-time decorators.

In November and December 1981, Jo Ann Tipton and Gary Boyd began to solicit authorization cards for the Petitioner. Tipton had been employed by the Sign Painters until February 27, 1981. Boyd, a leadman who has been referred for work to one of the Employers by the Sign Painters, works mostly for Freeman Decorating Company. The Petitioner held its first meeting on December 19, 1981, when a constitution and bylaws were adopted, and interim officers were elected. Tipton was elected business agent, and Boyd was elected treasurer. Altogether, 12 officers were elected, 5 of whom may work as leadmen.

The Employers have sole discretion in determining who will be a leadman. There are different categories of leadman. Some are permanently employed by the Employers; others are hired from the Sign Painters referral list when work is available. The latter do not always act as leadmen, but may act as journeyman decorators or exhibit builders. Finally, some leadmen are trainees and function as leadmen approximately 15 percent of the time. Even when serving as leadmen, the employees spend a substantial amount of time actually doing the work with the other decorators on the crew.

The Employers provide the leadmen with floor plans and instructions. Generally, the Employers' foremen assign the decorators to work with the leadmen. Only on rare occasions does a leadman directly contact the Sign Painters for decorators. The Employers cannot request specific decorators from the Sign Painters, and the Sign Painters would not honor such a request. If an Employer is dissatisfied with a particular employee, it so notifies the Sign Painters by letter, and that employee will not be referred to the Employer again.

The leadmen direct their crews in accordance with the floor plans and instructions. They report any problems to the Employer or to a supervisor. As the job nears completion, leadmen either contact the Employer to determine if the employees should be transferred, or lay off employees on the basis of seniority. Thus, seniority, which is determined by the Sign Painters, governs both hiring and laying off. One leadman who testified at the hearing stated that he has never sent an employee back to the hiring hall, and that if an employee engaged in "blatant" misconduct, he would report such employee to the Employer. The other leadman who testified stated that he would lay off an employee out of the order of seniority if the employee was lazy. He does this very rarely, however, and could not recall a single instance in 1981. An executive employed by Freeman Decorating Company testified that leadmen had the authority to lay off an employee for misconduct such as rudeness to customers, drinking, tardiness, or poor work.

Leadmen are responsible for reviewing and initialing timecards, and for preparing a form that lists any changes requested by the customer and the materials used in the job. Leadmen have no authority to grant promotions or wage increases, or to resolve grievances. They were covered by now-expired collective-bargaining agreements between the Sign Painters and the Employers.

We find that leadmen are not supervisors. Although they have authority to direct their crews, they may do so only in accordance with instructions and floor plans furnished by the Employers. Thus, directing the crews is essentially routine, and does not entail substantial independent judgment.[6] Leadmen report any problems to the supervisors. They have little or no authority over hiring employees onto their crews. Although they have authority to lay off employees, this too is mechanical and routine since layoffs are governed by seniority. The leadman who testified that he had laid off employees out of order of seniority was unable to recall a single instance in which he had done so.[7] Similarly, the testimony of the executive employed by Freeman Decorating Company that leadmen can discharge employees for egregious misconduct was conclusionary and not supported by even a single example. A discharge occurs when an Employer notifies the Sign Painters by letter that a particular employee should no longer be referred to that Employer. There is no evidence that leadmen have a role in instigating or preparing those letters. Finally, the leadmen's responsibility to

[6] See, e.g., *General Thermo, Inc.*, 250 NLRB 1260, 1264 (1980), enforcement denied on other grounds 664 F.2d 195 (8th Cir. 1981); *John Cuneo of Oklahoma, Inc.*, 238 NLRB 1438 (1978), enfd. 106 LRRM 3077 (10th Cir. 1980).

[7] Even if leadmen do possess this authority, it is so restricted and exercised so sporadically that it is not an indicium of supervisory status. *The Washington Post Company*, 254 NLRB 168 (1981); *Dad's Foods, Inc.*, 212 NLRB 500, 501 (1974); *Willis Shaw Frozen Food Express, Inc.*, 173 NLRB 487, 488 (1968).

review and initial timecards and to prepare other paperwork is merely routine and clerical, and is not indicative of supervisory status.[8] We also note that leadmen have historically been covered by the collective-bargaining agreements between the Sign Painters and the Employers. Our finding that leadmen are not supervisors obviates the contention that there is a conflict of interest between the Petitioner and the employees in the petitioned-for unit.[9]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

The Sign Painters entered into collective-bargaining agreements with each of the Employers. For the sake of convenience, those contracts will be referred to as the decorators' agreements. The decorators' agreements each expired on March 6, 1982. The petition was filed on December 8, 1981, and thus there is no contract bar with respect to the decorators' agreements.[10]

There is another agreement, however, called the tripartite agreement. This agreement was entered into by the Sign Painters, the Carpenters, Freeman Decorating, Transamerica, and United Exposition Service Company, Inc.[11] The Sign Painters, the Carpenters, and the Freeman companies contend that the tripartite agreement bars the petition in this case.

The tripartite agreement became effective on September 1, 1981, and is due to expire on September 1, 1984. It applies to conventions and trade shows where employees represented by the Carpenters are employed in decorating and exhibit building work. The tripartite agreement sets the terms and conditions of employment for those carpenters. It also seeks to eliminate jurisdictional disputes between the Carpenters and the Sign Painters.[12] Pursuant to the tripartite agreement, carpenters perform work such as uncrating, erecting, dismantling, and re-crating fabricated displays; handling and erecting hardwall booths, pegboards, sheetrock, and specially built booths; and building and installing platforms, walls, and other items. The tripartite greement reserves other work for employees represented by the Sign Painters. This work includes marking lines on exhibit floors; draping booths with cloth; installing aisle carpets and other items outside the exhibit booth areas; painting, handling, and hanging signs; and delivering furniture. The tripartite agreement provides that employees represented by the Sign Painters may be employed to do the work designated for Carpenters-represented employees. When they do that work, the tripartite agreement provides that they receive the carpenters' wage rate. Employees represented by the Sign Painters do carpenters' work very infrequently.

We find that the tripartite agreement does not bar the petition. Since decorators do the carpentry work set forth in the tripartite agreement only very rarely, it follows that the tripartite agreement does not set substantial terms and conditions of employment with respect to decorators. Rather, those terms and conditions were set by the now-expired decorators' agreements. It is those agreements, not the tripartite agreement, which chartered the course of the decorators' bargaining relationship with the Employers, and to which the parties looked for guidance in their day-to-day problems. Also, it appears that, even when decorators perform carpenters' work pursuant to the tripartite agreement, only their wages are set by that contract. The decorators' agreements supplied all of the other terms and conditions of employment.[13] It has long been settled that a collective-bargaining agreement will not constitute a bar if it is limited to wages only.[14] Finally, we note that the decorators' agreements terminated on March 6, 1982, while the tripartite agreement is due to expire on September 1, 1984. The parties have the ability to continue to execute indefinitely these contracts, expiring on different dates, with the consequence that a petition would never be timely if we found the tripartite agreement to be a bar. This is surely incompatible with the Act's goal of insuring that employees have maximum freedom in choosing a collective-bargaining representative.

4. The Petitioner seeks an election in a unit of all full-time convention and decorating employees, and temporary convention and decorating employees with over 1,000 hours' seniority, employed by the Employers in their Houston, Texas, operations. The Petitioner maintains that there is a multiem-

[8] *John Cuneo of Oklahoma, Inc., supra* at 1439.

[9] Jo Ann Tipton, the Petitioner's business agent, was discharged from her employment at the Sign Painters, and Freeman Decorating and Freeman Design maintain that the purpose of the Petitioner is merely to "retaliate" against the Sign Painters for this discharge. This allegation is totally unfounded. There is not a scintilla of evidence that the Petitioner does not intend to represent the decorators fairly and to operate solely in their interest.

[10] *General Cable Corporation*, 139 NLRB 1123 (1962).

[11] United Exposition is engaged in the same type of work as the other Employers.

[12] The tripartite agreement was at issue in *Carpenters Local Union No. 213 and Carpenters District Council of Houston and Vicinity (Brede, Inc. of Houston)*, 202 NLRB 776 (1973), a proceeding under Sec. 10(k) of the Act which resolved a jurisdictional dispute between the Sign Painters and the Carpenters.

[13] Cecil Guinn, the Sign Painters business manager and financial secretary, testified that even a jurisdictional dispute between the Carpenters and the Sign Painters would be resolved pursuant to the grievance procedures set forth in the decorators' agreements.

[14] *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163–64 (1958).

ployer bargaining unit which is an appropriate unit in which to conduct the election. All of the other parties contend that there is no multiemployer bargaining unit.

The Employers met separately with the Sign Painters when previous contracts were negotiated. They also met separately to negotiate wage reopeners in 1977 and 1978. When the decorators' agreements were negotiated in 1979, the Employers met together as a group with the Sign Painters. Initially, Keith Kennedy, a vice president at Freeman Decorating, was the spokesman for the Employers. Kennedy was replaced in this role by V. Scott Kneese, attorney for the two Freeman companies. Kneese stated to the representatives of the other Employers that he would be the spokesman in the negotiations, but that he represented only the two Freeman companies and that, should any conflict arise, his obligations, responsibilities, and loyalties rested solely with the Freeman companies. When Kneese first met with the Sign Painters negotiators, he similarly informed them that, although he was the spokesman of the Employers, the Employers were not bargaining as a multiemployer association. During negotiations, a representative of at least one other Employer occasionally acted as spokesman. Representatives of other Employers participated in the negotiations, and they could and did take positions different from those put forth by Kneese. When the parties finally reached agreement, each Employer entered into a separate contract with the Sign Painters. The recognition clause in each contract stated that:

> The Company recognizes the Union as the collective bargaining agent for all convention and decorating employees, including Exhibit Journeymen, Exhibit Helpers, Sho-card Writers, Junior Helpers and Seamstresses employed by the Company only at its Houston, Texas operations, excluding office clerical employees, guards, watchmen and supervisors as defined in the National Labor Relations Act, as amended.

We find that there is no multiemployer unit. Such a unit exists only where employers indicate an unequivocal intent to be bound as a group for collective-bargaining purposes.[15] Here, in contrast, the Employers clearly manifested an intent *not* to be bound as a group. There is no history of multiemployer bargaining.[16] And, during the 1979 negotiations, Kneese clearly made known to all participants that the Employers were not bargaining as a group at that time either. Representatives of the other Employers also actively participated in the negotiations.

Finally, the Sign Painters and each Employer entered into separate contracts that contained recognition clauses stating that each individual Employer recognized the Sign Painters as the exclusive representative of its employees. We therefore reject the Petitioner's contention that there is a multiemployer bargaining unit, and we find that single-employer units are appropriate.[17] Accordingly, we find that the following units constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time convention and decorating employees employed by Artcraft Displays, Inc., at its Houston, Texas, operations, and those temporary convention and decorating employees with over 1,000 hours' seniority currently working, or available for work and who appear on the November 1981 seniority list of Sign and Pictorial Painters, Local Union No. 550, a/w International Brotherhood of Painters and Allied Trades, excluding office clerical employees, guards, watchmen, and supervisors as defined by the Act.
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> All full-time convention and decorating employees employed by Freeman Decorating Company, at its Houston, Texas, operations, and those temporary convention and decorating employees with over 1,000 hours' seniority currently working, or available for work and who appear on the November 1981 seniority list of Sign and Pictorial Painters, Local Union No. 550, a/w International Brotherhood of Painters and Allied Trades, excluding office clerical employees, guards, watchmen, and supervisors as defined by the Act.
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> All full-time convention and decorating employees employed by C.D. Displays, Inc., d/b/a Freeman Design & Display Company, at its Houston, Texas, operations, and those temporary convention and decorating employees with over 1,000 hours' seniority currently working, or available for work and who appear on the November 1981 seniority list of Sign and Pictorial Painters, Local Union No. 550, a/w International Brotherhood of Paint-

[15] *Van Berden Company, etc.*, 154 NLRB 496, 499 (1965).

[16] "[T]o establish a claim for a broader unit a controlling history of collective bargaining on a broader basis or agreement of the parties is necessary." *Cab Operating Corp.*, 153 NLRB 878, 879–880 (1965).

[17] At the hearing, Freeman Design moved to be dismissed on the ground that the Petitioner does not seek to represent exhibit building employees. The Petitioner does in fact seek to represent those employees, and they share a community of interest with the decorators. Accordingly, we include them in the units and deny Freeman Design's motion.

ers and Allied Trades, excluding office clerical employees, guards, watchmen, and supervisors as defined by the Act.

All full-time convention and decorating employees employed by Transamerica Convention Service, Inc., at its Houston, Texas, operations, and those temporary convention and decorating employees with over 1,000 hours' seniority currently working, or available for work and who appear on the November 1981 seniority list of Sign and Pictorial Painters, Local Union No. 550, a/w International Brotherhood of Painters and Allied Trades, excluding office clerical employees, guards, watchmen, and supervisors as defined by the Act.

All full-time convention and decorating employees employed by United Display, Inc., at its Houston, Texas, operations, and those temporary convention and decorating employees with over 1,000 hours' seniority currently working, or available for work and who appear on the November 1981 seniority list of Sign and Pictorial Painters, Local Union No. 550, a/w International Brotherhood of Painters and Allied Trades, excluding office clerical employees, guards, watchmen, and supervisors as defined by the Act.

5. The parties disagree regarding the formula to be used in determining which employees are eligible to vote in the elections. The convention and trade show business in Houston is seasonal. The busiest time of the year is the first two quarters of the calendar year, and the peak occurs in the second calendar quarter. The gist of the problem in devising an eligibility formula here involves extending the voting franchise to the part-time employees who are hired from the Sign Painters referral list. The Petitioner proposes a formula which yields the yearly average number of hours worked by each part-time employee. The Petitioner would presumably include all part-time employees who have worked more than this average. The Freeman companies advocate a formula based upon the one used in *Manncraft Exhibitors Services, Inc.*, 212 NLRB 923 (1974). The employer in *Manncraft* was engaged in essentially the same type of business as are the Employers in this case. The *Manncraft* formula included all employees who worked a minimum of 15 days in the calendar quarter preceding the eligibility date. The Freeman companies would modify the formula so that it applies only to the second quarter of the 1982 calendar year, which is the peak of the Employers' busy season. The Sign Painters proposes a formula that would include part-time employees who were employed by an Employer on at least two show jobs for a minimum of 40 working hours during 1981. Alternatively, the Sign Painters seeks a formula that would include part-time employees who worked at least 15 days during the first two calendar quarters of 1981.

We find that the formula suggested by the Freeman companies is the most equitable. Promulgation of an eligibility formula for the part-time employees depends on a careful balancing of the factors of length, regularity, and currency of employment giving due regard for the industry involved. The Employers are busiest during the first two calendar quarters, and particularly during the second quarter, and accordingly the greatest portion of part-time decorators are employed during that period. In cases involving year-round operations with a fluctuating need for extra employees, the Board has found it equitable to include in the unit, on the basis of available records of employment, all extra employees who had worked a minimum of 15 days in the calendar quarter preceding the eligibility date, reasoning that devoting that much time to unit work evidenced a substantial and continuing interest in the unit.[18] Such employees have a reasonable expectancy of reemployment, and therefore share a community of interest with the regular, full-time employees. We adopt that formula here, modified so that it applies to the second calendar quarter of 1982, the Employers' busiest season. As modified, the formula will include only part-time decorators with enough seniority so that they have a reasonable expectation of reemployment and share a community of interest with the full-time employees in the units. The part-time employees eligible to vote are thus those who have worked for a minimum of 15 days during the second calendar quarter of 1982. Accordingly, we shall direct elections in the above-described units.

[Direction of Elections[19] and *Excelsior* footnote[20] omitted from publication.]

[18] See, e.g., *Manncraft Exhibitors Services, Inc., supra; Scoa, Inc.*, 140 NLRB 1379 (1963); *Motor Transport Labor Relations, Inc.*, 139 NLRB 70 (1962).

[19] At the hearing, the parties raised an issue regarding the proper method for conducting the balloting. It was suggested, for example, that balloting by mail might be appropriate in the circumstances of this case. The Board is not in a position to structure the actual mechanics of the balloting, and so we will let the Regional Director for Region 23 determine all aspects of the balloting procedure.

[20] The part-time employees eligible to vote are those who have worked in a unit for a minimum of 15 days during the second calendar of 1982.